No. 82-1071

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ALUMINUM COMPANY OF AMERICA, *et al.*,
Petitioners,

v.

CENTRAL LINCOLN PEOPLES UTILITY DISTRICT, *et al.*,
Respondents.

and

PETER JOHNSON, as Administrator of the BONNEVILLE POWER ADMINISTRATION, Department of Energy, and DONALD PAUL HODEL, as Secretary of the DEPARTMENT OF ENERGY, and the UNITED STATES OF AMERICA,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF *AMICUS CURIAE* BY THE AMERICAN PUBLIC POWER ASSOCIATION AND THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION IN SUPPORT OF CENTRAL LINCOLN PEOPLES UTILITY DISTRICT, *ET AL.*, SEEKING AFFIRMANCE OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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QUESTION PRESENTED

Whether, in accordance with the Ninth Circuit's construction, the Pacific Northwest Electric Power Planning and Conservation Act requires that Respondents' historical rights of preference with regard to nonfirm power be retained in their entirety.

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OPINION BELOW

The Ninth Circuit's Opinion, as amended, is reported at 686 F.2d 708.

JURISDICTION

The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The Ninth Circuit's Opinion was rendered on April 6, 1982 and thereafter amended by Order dated September 7, 1982. A timely petition for rehearing was denied on September 27, 1982, and a petition for certiorari was filed thereafter within 90 days. The Court entered its Order granting the petition for writ of certiorari on March 28, 1983.

STATEMENT OF THE CASE

The Bonneville Power Administration (hereinafter, "BPA") was created by Congress in 1937 to market electricity produced at certain federally-owned hydroelectric projects in the Pacific Northwest. The Agency's enabling statute contained an explicit provision setting forth priorities governing power allocation:

> "In order to insure that the facilities for the generation of electric energy at the Bonneville Project shall be operated for the benefit of the general public, and particularly of domestic and rural customers, the administrator *shall at all times*, in disposing of electric energy generated at said project, give preference and priority to public bodies and cooperatives." (Emphasis added) 16 U.S.C. § 832c(a).

In accordance with its statutory mandate, BPA has consistently granted priority to publicly-owned utilities and cooperatives when formulating its power marketing plans. BPA adhered to its statutory responsibility to meet the needs of its publicly-owned customers before selling electricity to privately-owned utilities and direct service industrial customers (hereinafter, "DSIs").

BPA sells two types of energy to its preference customers, "firm" and "nonfirm."[1] The Court below correctly described the two as follows:

> "Nonfirm energy is the energy in excess of that which BPA can reliably plan on producing and is therefore provided only when such an excess exists. Firm energy is the energy that BPA can reliably plan on producing and must be sufficient to serve BPA's firm loads."[2]

Publicly-owned utilities and cooperatives have always received priority from BPA in the sale and distribution of nonfirm energy. This policy has been deemed by the Regional Solicitor to be statutorily mandated.[3]

In the mid-1970's, increased energy demands and the lack of potential dam sites forced BPA to conclude that the Agency would no longer be able to meet the growing demand for electricity from its federally-owned installations. Accordingly, BPA notified the DSIs that their contracts would not be renewed, and informed the preference customers that the amount of federal power which would be available was insufficient to meet their needs. The Agency then began investigating administrative methods of allocation which would apportion the scarce resources among the preference entities[4].

Fearing a potential "regional civil war" over low cost power and faced with BPA's inability to fully serve its preference customers,[5] Congress intervened by enacting the Pacific Northwest Electric Power Planning and Conservation Act[6]

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[1] Nonfirm power which is sold to public bodies and cooperatives in the Pacific Northwest is also called "secondary" energy.

[2] 686 F.2d at 710.

[3] *See* pps. 19-20, *infra*.

[4] *See* House Committee on Interstate and Foreign Commerce Report, H.R. REP. 976 (I), 96th Cong., 2d Sess. 24-25 (1980).

[5] *Id.* at 27.

[6] 16 U.S.C. §§ 839-839h.

(hereinafter, "Regional Act"). As is discussed fully in this submission and in Respondents' Brief, the Regional Act explicitly preserves all rights of preference which were previously accorded to publicly-owned utilities and cooperatives pursuant to the aforementioned provisions of the Bonneville Project Act.[7]

After passage of the Regional Act, BPA entered into industrial sales contracts which eliminate respondents' statutory entitlement to preference in the allocation of nonfirm power.[8] The contracts were immediately challenged in a suit filed by the publicly-owned utilities. The Court below unanimously held that the plain meaning of the Regional Act preserves in all respects the rights of priority which had been previously set forth in the Bonneville Project Act.[9]

INTEREST OF THE AMICI CURIAE

This amicus brief is submitted on behalf of the American Public Power Association (hereinafter, "APPA") and the National Rural Electric Cooperative Association (hereinafter, "NRECA").[10] The American Public Power Association is the national service organization representing over 1,750 local public power systems located throughout the United States. Its membership includes municipally owned electric systems, distinct units of local government such as public power and irrigation districts, and state agencies such as the Public Service Authority of South Carolina. These publicly owned systems distribute 15% of the nation's electricity to 13.5% of the population.

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[7] *See* n.15, *infra*, for the language of the preference saving provisions in the Regional Power Act.

[8] 46 Fed. Reg. 44348 (1981).

[9] 686 F.2d at 715.

[10] All parties to this suit have consented to this filing. Written copies of said Consent have been submitted to the Clerk's office.

NRECA is a non-profit national service organization for some 1000 rural electric cooperatives which provide central station electricity to nearly 25 million consumers in 46 states. Rural electric cooperatives distribute roughly 11% of the nation's electricity and serve 10% of the population. As cooperatives owned by the consumers of their electricity, NRECA members seek to provide a reliable source of energy at the lowest possible cost.

The interests of the two organizations in this case are based in part on concern for the welfare of preference customers situated in the Pacific Northwest,[11] and in part on the duty to protect the statutory rights of preference wherever they are challenged. The interest of preference purchasers in the Pacific Northwest is clear. Petitioners seek to overturn the statutory right of priority to nonfirm power which respondents have received for years. Reversal of the opinion of the Court below would result in a significant increase in the cost of energy purchased by municipalities, public utility districts and cooperatives which constitute a portion of the membership of APPA and the NRECA.

Although the Ninth Circuit was interpreting a statute which applies only to the Pacific Northwest region, the APPA and NRECA still have a strong interest in this case on the basis of their historical role as champions of the rights of publicly owned utilities. More than thirty statutes enacted by Congress over the past 75 years have provided a preference for public power and rural electric cooperative systems in the purchase of surplus power generated at hydroelectric projects constructed and operated by the Federal Government.[12] APPA and NRECA have consistently supported the adoption of 'preference

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[11] BPA serves 116 preference customers.

[12] *See*, e.g., Federal Water Power Act of 1920, 16 U.S.C. § 800(a) (". . . the Commission shall give preference to applications by States and municipalities . . ."); Tennessee Valley Authority Act of 1933, 16 U.S.C. § 831 (". . . in the sale of such current, the Board shall give

clauses' by the Congress and have defended the preference rights of public power systems in numerous legal proceedings.

Consistent with their historical roles as staunch advocates of preference, these organizations directly participated in the legislative process which culminated in the enactment of the Regional Act. Spokesmen for both APPA and NRECA testified before the Senate Committee on Energy and Natural Resources on the manner in which early drafts of the legislation dealt with preference rights.[13] A major purpose in submitting this brief is to ensure that the Court is fully aware of the assurances which they received from Congress on these issues[14] and the actions which Congress took at the time the legislation was being developed.

In addition to preserving these assurances, APPA and NRECA feel compelled to challenge the characterization of preference entitlements upon which petitioners' entire argument is premised. By contending that Congress established a scheme for power allocation which eliminated the previous preference and priority to nonfirm energy, the DSIs and BPA are attempting to relegate the preference provisions of the Act to a discretionary guideline which can be altered or diminished

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preference to states, counties, municipalities, land cooperative organizations of citizens or farmers . . . all contracts made with private companies for the sale of power . . . shall contain a provision authorizing the Board to cancel said contract upon five years notice . . ."); Flood Control Act of 1944, 16 U.S.C. § 825s ("Preference in the sale of such power and energy shall be given to public bodies and cooperatives").

[13] *Pacific Northwest Electric Power Supply and Conservation Act: Hearings on S.2080 and 3418 before the Senate Committee on Energy and Natural Resources*, 95th Cong., 2d Sess., 1068-69 (APPA), 1103-04 (NRECA). *See* also pps. 14-15, *infra*.

[14] The express intent of Congress to preserve all rights of preference as demanded by APPA and NRECA at the time is supported at p. 15, *infra*.

as the Agency sees fit. The rights of preference which are at issue in this case are *not* subject to Agency discretion. They are mandated by explicit statutory language which is binding on the Agency. Further, the Regional Act specifically states that all such rights of preference remain unaffected. As long-standing proponents of these rights of priority, APPA and NRECA hope to assist the Court by pointing out the implicit defects in petitioners' attack on preference. In short, the amici assert an interest in preventing the statutory entitlements of their members from being illegally, unjustifiably and arbitrarily withdrawn.

SUMMARY OF ARGUMENT

This case presents a straightforward problem of statutory construction. BPA and the DSIs claim that Congress, in enacting the Regional Power Act, imposed a precise formula for allocating power in the Northwest, including the specific requirement that DSIs receive nonfirm power in order to meet their first quartile requirements before any nonfirm power would be made available to public preference entities.

Central Lincoln and the other public utilities involved in the case claim that Congress did not make such an allocation and that it expressly continued the BPA preference for all classes of power for public agencies and cooperatives.

The statute is indeed explicit about the preservation of the preference of public agencies and cooperatives.[15] The legisla-

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[15] The Act provides:

"All power sales under this Act shall be subject at all times to the preference and priority provisions of the Bonneville Project Act of 1937 (16 U.S.C. 832 and following) and, in particular, sections 4 and 5 thereof." 16 U.S.C. § 839c(a) (Section 5(a)).

"Nothing in this Act shall alter, diminish, abridge, or otherwise affect the provisions of *other* Federal laws by which public bodies and cooperatives are entitled to preference and priority in the sale of federally generated electric power." 16 U.S.C. § 839g(c) (Section 10(c)) (emphasis added).

tive history is equally straightforward and convincing on the Congressional intention to preserve all preference rights.

When it appeared that Congress, in attempting to resolve the "Civil War" which threatened to break out among BPA's customers, was considering legislation that did not protect the preference clause, APPA and NRECA entered the Congressional debates to argue that the preference clause which has existed in various forms since 1887[16] should not be violated and eroded. APPA and NRECA, on behalf of their hundreds of members who regard preference as their life blood, were not concerned only with protecting preference to firm power. They were concerned with the disposition of all power marketed by BPA. Their understanding that preference does not vary on the basis of the type of power being allocated was consistent with both a prior judicial interpretation on the reach of the preference clause[17] and with BPA's existing practice in the sale of nonfirm energy.

The position advocated by APPA and NRECA was accepted by the principal authors of the Regional Act and resulted in subsections 5 (a) and 10(c) being adopted. This view was corroborated by Representative Swift, who introduced H.R. 8157, which was ultimately adopted:

> "The bill avoids the administrative reallocation problem by authorizing BPA to add to its power supply so that it can meet the needs of all its customer classes. *The bill does so under power supply and rate provisions that are acceptable to all classes of BPA customers and that fully protect the preference rights of public bodies and cooperatives.*"

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[16] *See* n.20, *infra*.

[17] The Ninth Circuit has made it clear that preference rights do not vary on the basis of what type of energy is being allocated. *Arizona Power Pooling Association* v. *Morton*, 523 F.2d 721, 727 (9th Cir. 1975) (preference applies fully to interim non-federal thermal energy which is purchased for sale by the federal agency).

Representative Swift went on to say,

> *"The bill does not violate the preference clause: The bill has been amended to insure full protection of the traditional preference rights of public bodies and cooperatives. The Public Power Council, the National Rural Electric Cooperative Association, and the American Public Power Association are in full agreement that the bill in its present form protects preference."*
>
> 126 CONG. REC. H9851, Sept. 29, 1980 (remarks of Rep. Swift) (emphasis added).

If the authors of the legislation had been aware that the interpretation asserted by the DSIs and BPA resulting in a diminution of preference rights was a possible construction of their language, they would have withdrawn their support for the bill and almost certainly there would have been no legislation enacted.[15]

Notwithstanding these facts, BPA and the DSIs suggest that their interpretation would "only" affect nonfirm power and that it was the intent of Congress to simply provide a minor amendment to the otherwise inviolate preference preserved by subsections 5(a) and 10(c). Preservation of preference was simply too important to the participants and too central to the overall solution to the energy problems of the Pacific Northwest to have been modified through obscure or artfully crafted interpretations of bits and pieces of statutes. If Congress had intended to alter drastically the character of the preference clause, it would have done so only after a full scale debate. Their decision to alter preference would have been crystal clear, albeit highly controversial.

The statutory language on preference is direct, simple, and unambiguous. The legislative history supports and sustains the statutory language, as does reason in making the Act workable. And, most significantly, the statutory provisions and the legislative history further and implement solid public policy which Congress and the Nation have consistently supported.

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[15] *See* pps. 13-15, *infra*.

ARGUMENT

I. REVERSAL OF THE PREFERENCE FOR PUBLIC BODIES AND COOPERATIVES TO NONFIRM ENERGY WOULD BE CONTRARY TO THE PUBLIC INTEREST.

Sections 5(a) and 10(c) of the Regional Power Act preserve in all respects the preference rights accorded to public bodies and cooperatives under the Bonneville Project Act and other federal reclamation statutes.[19] Those savings provisions thereby retain a long legacy of Congressional policy determinations relating to the allocation of electric power produced at federal hydroelectric facilities. The considerations which have produced strong and consistent Congressional support for the preference concept remain compelling in the context of today's power market requirements and practices.

In the past century, Congress has consistently incorporated the concept of preferential treatment for public bodies into statutes authorizing the distribution and use of public water resources.[20] This preferential allocation of federally financed hydroelectric power to the general public derives ultimately from the Commerce Clause of the United States Constitution.[21] Additionally, the preference for public bodies

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[19] *See* n.15, *supra*.

[20] *See, e.g.*, Desert Land Act of March 3, 1877, 19 Stat. 377; the Homestead Act of 1891, 43 U.S.C. § 162; the Raker Act of 1913, 38 Stat. 242, 245; Federal Water Power Act of 1920, 16 U.S.C. § 800; Boulder Canyon Act of 1928, 43 U.S.C. § 617d(c); the Tennessee Valley Authority Act of 1933, 16 U.S.C. § 831; Rural Electrification Administration Act, 7 U.S.C. § 904; the Bonneville Project Act, 16 U.S.C. §§ 832-8321; the Fort Peck Project Act, 16 U.S.C. § 833; Reclamation Act of 1939, 43 U.S.C. § 485h(c); Water Conservation and Utilization Act, as amended, 16 U.S.C. § 590z-7; Flood Control Act of 1944, 16 U.S.C. § 825s; River and Harbor Act of 1945, 33 U.S.C. § 544b; Eklutna Project Act, 48 U.S.C. § 312(a).

[21] *Gibbons* v. *Ogden*, 22 U.S. 1 (1824).

implements the national policy of dispersing the benefits of Federal property rights to the public rather than to private profit-seeking entities.[22]

The preference provisions of the Bonneville Project Act of 1937 and the relevant legislative history implement and ratify these policy considerations by unequivocally placing public bodies and cooperatives ahead of private industry with respect to power allocation.[23] The Act instructs the Administrator to market power in a manner which at all times gives preference and priority to public bodies and cooperatives, 16 U.S.C. § 832c(a), so that facilities will be operated "for the benefit of the general public, and particularly of domestic and rural customers." *Id.* Public entities seeking power allocations are given time to obtain financing and construct transmission facilities necessary to deliver the power to their systems before power can be allocated to competing private applicants. 16 U.S.C. § 832c(d).

In enacting these far-reaching preference provisions, Congress sought to prevent private industry from monopolizing the benefits of the Bonneville project.[24]

> "[The preference] provisions were intended to prevent federal power from being contracted to a small area or to an overly limited number of wholesale customers when

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[22] Fereday, *The Meaning Of The Preference Clause For Hydroelectric Power Allocation Under The Federal Reclamation Statutes*, 9 Envt'l L. 601, 612 (1979).

[23] *See* p. 1, *supra*.

[24] This desire to prevent private industry from receiving inordinate benefits from the expenditure of tax dollars was in fact pointed directly at one of the industries which is a principal petitioner in this case. In debate on the bill, Congressman Pierce of Oregon commented on the aluminum companies as follows:

"Such an industry, absorbing all the Bonneville output, would bring little advantage to the Pacific Northwest and probably would employ but few men because so largely automatic." He further

> there are others who desire the energy. Like the TVA Act before it, the Bonneville Act was intended to place industry in a category junior to preference customers . . ." *Fereday, The Meaning of the Preference Clause In Hydroelectric Power Allocation Under the Federal Reclamation Statutes*, 9 Envt'l L. 601, 630-31 (1979).

The House Report on the Bonneville Project Act was crystal clear in expressing the view that the preference clause was intended to put preference entities ahead of industry in the distribution and sale of the project's hydropower:

> "No contract for the sale of electrical energy to any private business interest shall be entered into until the Federal Power Commission has given full consideration to the actual or potential needs and demands of the public agencies and cooperative organizations." H.REP. No. 2955, 74th Cong., 2d Sess. 3 (1937).

The preference provisions thus were originally intended to prevent the direct service industries from gaining undue access to the federal hydroelectric energy. It is precisely this access which petitioners seek to achieve in this appeal. In effect, they argue that a century of Congressional policy and the Regional Act's preference-saving provisions should be ignored, and that electricity consistently earmarked as "public property" should be channeled to them. No statute rescinding preference has been cited, and no rationale for ignoring sections 5(a) and 10(c) of the Regional Power Act has been presented. The DSIs are substantial beneficiaries of the Regional Power Act to the extent they are assured of continued availability of the same amount of power to which they were entitled

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pointed out the situation in New York, where up to 90 percent of the supposedly public power output was under contract to private industry, mostly aluminum companies. He cautioned Congress to avoid legislative standards which would allow these interests "to absorb the entire output of BPA power" and stressed that the marketing of Bonneville power "carries also the idea of prevention of monopolization of this energy by limited groups and localities," 81 CONG. REC. 4434 (1937).

under the pre-1975 contracts, but Congress did not, directly or indirectly, give them more than those contracts entitled them to receive.

Among other objectives, the preference provisions in the Bonneville Project Act were intended to guard against DSIs, primarily aluminum companies, garnering a share of BPA power out of proportion to their contribution to the region as measured by employment. Apparently this fear was justified. As of 1977, the aluminum industry in the Northwest accounted for 25 percent of the region's total electricity consumption and nearly a third of Bonneville's sales, yet the industry provided employment for only 0.5 percent of the region's work force.[25] These figures supply a rationale for upholding preference rights, not eroding them.

In their Petition For Writ of Certiorari, petitioners state that the Opinion of the Court below "seriously jeopardizes continued DSI operations in the Northwest." This is simply not the case. The Government Accounting Office recommended that BPA

> "*decrease* the quantities of power allocated to a DSI customer until the plant receives only as much power as would be needed by a modernized plant of the same capacity and technology." (emphasis added) *Impacts and Implications of the Pacific Northwest Power Bill*, Sept. 4, 1979 at 18-19.

This advice was based on two studies of the impact on the DSIs of increased rates, both of which contradict the scenario offered by petitioners.

> "A consultants' study conducted for us in 1977 indicated that the salvage value of Pacific Northwest aluminum

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[25] *R. Beers and T. Lash, Choosing An Electrical Energy Future For The Pacific Northwest: An Alternative Scenario*, reprinted in Bonneville Power Administration And Department of Interior, The Role Of The Bonneville Power Administration In the Pacific Northwest Power Supply System, A Program Environmental Statement And Planning Project - Part I - The Regional Electric Power Supply System, Attachment A (1977).

> plants would have a major bearing on industry reactions to higher energy prices. The study showed that if electrical energy for Pacific Northwest aluminum companies were increased from the present 3 mills/kwh to 25 mills/kwh, the two least efficient plants in the region might cease operations. The other eight plants would likely be modernized, take on more workers, and produce more aluminum without increasing their consumption of energy." GAO, *Ibid.*, at pps. 17-18.

The second study of Northwest aluminum producers, conducted by the Department of Commerce at BPA's request, was completed in April 1979. It concluded that " . . . there is little likelihood of any Pacific Northwest plants being shut down as a result of increasing power costs under the proposed legislation;" and that " . . . modernization of [the four least efficient] plants would be profitable". GAO, *Ibid.* at pps. 17-18.

The ultimate result under the studies would be increased efficiency and modernization combined with decreased demand for electricity. Petitioners' claim that the interruptibility of nonfirm power will cause them to go out of business is not persuasive. BPA's attempted allocation of nonfirm power to the DSIs in disregard of the preference clause is objectionable on policy grounds as well as for the statutory and legal reasons stated elsewhere in this brief.

II. BPA'S INTERPRETATION OF THE STATUTE IS INCONSISTENT WITH THE PARTIES' STATED UNDERSTANDING AT THE TIME OF PASSAGE AND WAS NOT AMONG THE RANGE OF OPTIONS WHICH WERE CONSIDERED BY CONGRESS.

Complete protection for preference was an essential prerequisite to enactment of the Regional Act. This fact was recognized by BPA in a May 20, 1979 document outlining issues relevant to the pending legislation:

> "[The] . . . facts have set the stage for an imminent and protracted legal battle within the Northwest over the meaning and application of the preference clause, the

> formation of new preference utilities or other entities claiming preference status, and the fate of the DSIs . . .
>
> *This regional legal battle can be laid to rest if* (1) the DSIs are able to trade in their existing low-cost power contracts for new contracts at higher rates; (2) the low cost power released by the DSIs can be made available to residential and small farm customers of regional IOU's; and (3) *the preference rights of publicly-owned and cooperative utility systems can be preserved.*" H.REP. 96-976, Part I (Commerce), p. 36. (emphasis added).

Congress itself reached the same conclusion. As the Commerce Committee stated,

> " . . . a variety of legislative approaches have been introduced and extensive hearings have been held. These hearings showed that acceptable legislation had to include: (1) strong conservation provisions; (2) provisions protecting the existing preference clause; . . . *Ibid.* at 27.

The role played by APPA and NRECA in assisting Congress with the drafting of the provisions in section 5 is consistent with the Committee's assessment. At early hearings on the legislation, these and other representatives of the publicly-owned utilities testified that the initial proposals did not adequately protect the statutory rights of preference which had always been mandated by the Bonneville Project Act. *Pacific Northwest Power Supply and Conservation Act: Hearings on S. 2080 and 3418 Before The Senate Committee on Energy and Natural Resources*, 95th Cong., 2d Sess., 1053 (Washington Public Utility Districts' Association), 1058, 1064 (Snohomish County Public Utility District), 1068-69 (American Public Power Association), 1079 (Public Power Council), 1103-04 (National Rural Electric Cooperative Association), 1112 (Eugene Water and Electric Board).

The Executive Director of APPA testified that the bills as drafted failed to preserve the preference principle. *Id.*, p. 1069. He recommended that Section 5 be amended to include a provision which would state that all BPA sales remain subject

to the preference provisions of the Bonneville Power Act. [25] Senator Jackson, one of the sponsors of the legislation stated,

> "we will certainly have additional language that will make clear the continuity of the preference provision in the law." *Id.* at 1062.

Accordingly, Senator Jackson amended the legislation when it was reintroduced in the subsequent session by adding the provisions which ultimately became sections 5(a) and 10(c) of the Regional Act. S.REP. No. 95-272, 96th Cong., 1st Sess., 4, 14 (1979).

If petitioners disagreed with the assessments of the Congressional Committees, legislators and interested parties, they never revealed their objections. Nowhere in the legislative history can any suggestion be found that the traditional rights of preference with respect to nonfirm power would no longer be available under this legislation. In fact, the DSIs had learned to live with the reality that preference was to be preserved in every respect and were satisfied because the proposal guaranteed them long-term contracts, albeit at much higher prices. Counsel for the DSIs stated during hearings on the bill,

> "Under this legislation, the price of a reasonable degree of planning certainty for the DSIs is the surrender of their existing low-cost power contracts in exchange for new contracts with dramatically higher rates and substantially lower power quality." Hearings on H.R. 3508 and 4159, before Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce, 311 (1979) (Testimony of Eric Redman).

This statement is entirely inconsistent with the present DSI claim of entitlement to priority allocations of nonfirm power.

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[25] APPA testified that the legislation should be amended " . . . to state that all BPA sales are subject first to the preference provisions of the Bonneville Project Act, including the 5-year withdrawal feature of contracts with private power companies." *Id.* at 1069. (Testimony of Alex Radin).

Congress shared the view that the DSIs would benefit greatly from being able to enter into long-term contracts. The House Committee Report alludes repeatedly to the fact that BPA warned the DSIs that no renewal of their power sales contracts would be available after 1981 in the absence of federal legislation. H.REP. 96-972, Part II (Interior), pps. 30, 31. There is no indication that any legislator viewed the higher prices to be paid by DSIs as consideration for an increase in the volume or quality of power they would be entitled to purchase.

Congress enacted the Regional Act to provide certainty with respect to future allocations to all customers, including those eligible for preference. The Report of the Committee on Interior and Insular Affairs discusses administrative allocation strategies which were being developed by BPA for implementation in the absence of federal legislation. One such proposal would have limited future allocations to preference customers to a pro rata share after 1991. In commenting on the inadequacy of this approach, the Report states,

> "Unfortunately, these shares will fall far short of meeting their requirements, . . . Before 1991, no BPA customers will be assured of getting its requirements met by BPA or certain in advance how much power it will be entitled to. Existing preference customers will, for the most part, be limited to supplies in accordance with their existing contracts . . . New preference customers will divide up most of the power "freed up" by expiring DSI contracts, but the amount available to each will be impossible to determine in advance and will likely be insufficient to meet their needs." H.REP. 96-976, Part II (Interior), p. 31.

The Act was intended to alleviate uncertainties with respect to future preference allocations. Yet the industrial purchase contracts would accomplish the opposite by diminishing the predictability of allocations to public bodies and cooperatives. Further, the DSIs did not suffer from undue uncertainties resulting from the preference customers' priority to nonfirm power. In a Report prepared for the House Energy and Power

Subcommittee while it considered the proposed Regional Act, the General Accounting Office stated that,

> "The DSIs rarely have to reduce production, even when their power supplies are interrupted by BPA. Before restricting deliveries to the DSIs, BPA can supply them an 'advance of energy' up to 2 million kwh." GAO, *Impacts and Implications of the Pacific Northwest Power Bill*, Sept. 4, 1979 at p. 16.

The Regional Act's express objective of promoting energy conservation[7] provides additional support for the thesis that the authors of this legislation never expected the bill to transfer preference rights to the DSIs. The House Commerce Committee referred to conservation as "the linchpin of this legislation," and stated that "the Committee expects that the DSIs will do their part to conserve energy." H.REP. No. 96-976, Part I (Commerce), p. 63. This directive was based in part on responses which Representative John D. Dingell, Chairman of the Energy and Power Subcommittee, received from the GAO with regard to potential savings. GAO stated,

> "Most DSI plants were constructed in the 1940's and 1950's. The potential for electricity conservation in some plants with older production facilities may be significant. There are large differences, for example, in the relative electrical efficiency of the 10 Northwest aluminum smelters. The most efficient smelter operates at just over 6 kwh per pound of production, while the least efficient

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[7] Section 2 states in relevant part:

"The purposes of this chapter . . . are . . . conservation and efficiency in the use of electric power." 16 U.S.C. § 839(1)(A).

Section 4 states in relevant part:

"The purposes of this section are . . . to provide for . . . a regional conservation plan." 16 U.S.C. § 839b(a)(1).

> smelters consume one-third more electricity—operating at over 8 kwh per pound of production. GAO, *Impacts and Implications of the Pacific Northwest Power Bill*, Sept. 4, 1979, p. 14.

Accordingly, GAO recommended that the Chairman amend the legislation to

> "—Authorize BPA, when necessary, to gradually decrease the quantities of power allocated to a DSI customer until the plant receives only as much power as would be needed by a modernized plant of the same capacity and technology. This action would be taken by BPA only if voluntary conservation efforts by the DSI customer proved insufficient to meet commercial standards for production efficiency. *Ibid.* at 18 and 19.

GAO made it clear that significant energy savings can be accomplished by means of modernizing plants operated by the DSIs. The Committee did not accept the GAO recommendations designed to reduce the DSIs' entitlements in the precise manner suggested. However, the restriction on allocations to DSIs embodied in § 5(d)(1)(B)[25] was enacted with the GAO recommendations in mind, as is evidenced by the House Committee's expectation "that the DSIs will do their part to conserve energy." The BPA and DSI position that the Regional Act was intended to entitle them to a newfound priority with respect to nonfirm energy is clearly inconsistent with the expectations of Congress as well as the affected parties.

III. THE 9TH CIRCUIT CORRECTLY CONCLUDED THAT BPA'S ATTEMPT TO DIMINISH PREFERENCE WAS UNLAWFUL.

A. The BPA/DSI Contracts Are Inconsistent With The Plain Meaning Of The Regional Act.

After passage of the Regional Act, the BPA Administrator entered into new industrial purchase contracts which provide

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[25] § 5(d)(1)(B) limits DSI entitlements under the Act to "an amount of power equivalent to that to which such customer is entitled under its contract dated January or April 1975." 16 U.S.C. § 839c(d)(1)(B).

for the sale of nonfirm power to direct service industrial customers ("DSIs") while limiting the purchase of that electricity by preference entities. These contracts repudiate the preference and priority which BPA has historically accorded to public bodies[29] pursuant to the Bonneville Project Act of 1937, 16 U.S.C. § 832c.

Petitioners have cited statutory provisions and accompanying legislative materials[30] which they claim support the view that Congress had in mind a specific allocation scheme which overrides conflicting priority rights previously enjoyed by preference customers. The Court below found that the plain meaning of the Regional Act preserves all preference rights in their entirety.[31] Therefore, resort to extrinsic aids such as legislative history is unnecessary.[32] The Act clearly precludes the interpretation advanced by Petitioners, and the case can be disposed of solely by reference to the language of the Act itself.

Did Congress, in enacting the Pacific Northwest Electric Power Planning and Conservation Act, authorize the Bonneville Power Administration to allocate secondary "nonfirm" hydropower initially to its direct service industrial customers, where that power was previously available to municipalities and cooperatives on a priority basis?

Prior to the Act's passage, there was never any question that public bodies' preference entitlement applied to both firm and secondary (nonfirm) power. A 1956 legal opinion written by BPA's staff attorneys stated,

> "The Bonneville Project Act requires that the Administrator shall at all times in disposing of electric energy

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[29] *See* pps. 10-11, *supra*.

[30] *See* Petitioners Brief at 23-24.

[31] 696 F.2d 706, at 713.

[32] 2A Sutherland Statutory Construction, 4th Ed. (Sands) § 48.01, p. 82. Cf. *United States* v. *Donruss Co.*, 393 U.S. 297, 21 L.Ed. 2d 516, 89 S.Ct. 501 (1969), *Wiggins Bros., Inc.* v. *DOE*, 667 F.2d 77 (Emerg. Ct. App. 1981).

> generated at projects subject to the Act, give preference and priority to public bodies and cooperatives. Section 4(a). This applies to all electric energy generated at the projects, *both firm and secondary*. Accordingly, the same legal requirements will govern the sale of by-product secondary as now govern sales of firm power. If public bodies or cooperatives make application to purchase the energy under the new pricing policy inaugurated, their needs will have to be met first." Opinion of the Office of the Regional Solicitor, Portland, March 5, 1956. (emphasis added).

Petitioners contend that the Regional Act altered those historical entitlements by allowing BPA to enter into contracts with DSIs, the provisions of which would effectively deny to preference customers their priority with respect to nonfirm power.

The Act could not be clearer with respect to the status of the preference rights historically accorded to "public bodies" pursuant to the Bonneville Project Act and other Federal statutes. Section 5(a) states,

> "All power sales under this Act shall be subject at all times to the preference and priority provisions of the Bonneville Project Act of 1937. . . "

Similarly, Section 10(c) provides,

> "Nothing in this act shall alter, diminish, abridge, or otherwise affect the provisions of other Federal laws by which public bodies and cooperatives are entitled to preference and priority in the sale of federally generated electric power."

The two provisions quoted above are unequivocal. Any interpretation of the Regional Power Act which results in the diminution of respondent's preference rights is clearly prohibited.

B. Petitioners Rely On A Selected Portion Of Section 5 Lifted Out Of The Statutory Context; Taken In Context, The Statute Does Not Support Their Position.

Examined in the context of section 5 in its entirety, the provision relied upon by petitioners fails to support their position. The specific language which petitioners cite for the proposition that Congress envisioned specific allocations of constant nonfirm power to the DSIs is stated in the second sentence of § 5(d)(1)(A):

> "The Administrator is authorized to sell in accordance with this subsection electric power to existing direct service industrial customers. Such sales shall provide a portion of the Administrator's reserves for firm power loads within the region." 16 U.S.C. § 839(c)(d)(1)(A).

Their argument is that by authorizing BPA to use DSI allocations as reserves for firm power loads, Congress impliedly forbade the use of such power for nonfirm purposes.

Petitioners assume that Section 5(d)(1)(A) addresses the question of how to treat the nonfirm power which had always been subject to the priority rights of preference customers. The Court below disagreed:

> "Section 5(d)(1)(A) specifies only that the reserve shall be used for firm power loads; it says nothing about the provision of nonfirm energy."[51]

Petitioners' reliance on the definition of "reserves" is misplaced. Section 3(17) of the Act defines "reserves" as "the power needed to avert . . . shortages for the benefit of firm power customers . . . " 16 U.S.C. § 839(a)(17). This definition, by its very terms, is inapplicable to the initial allocation of *nonfirm* power to preference customers. Even if petitioners' strained reading of the implied meaning of section 5(d)(1)(A) were accepted, retention of the preference entitlement to nonfirm power would be consistent with that interpretation.

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[51] 686 F.2d at 813.

The petitioners' view of section 5(d)(1)(A) is inconsistent with section 5 read as a whole. The provision relied upon cannot be read in a vacuum. When section 5(d)(1)(A) is analyzed in conjunction with related subsections, it is clear that the provision relied upon by petitioners does not alter the right of preference customers to initial allocations of nonfirm power from BPA.

Subsection 5(g)(7) of the Regional Power Act states,

> "The Administrator shall be deemed to have sufficient resources for the purpose of entering into the initial contracts specified in paragraph (1)(A)-(D)." 16 U.S.C. § 839(c).

Paragraph (1)(D) directs the Administrator to enter into negotiations for the purpose of executing long-term contracts with direct service industrial customers under subsection (d)(1). Hence the Administrator's authority to negotiate long-term industrial purchase contracts with the DSIs is governed by the provisions of subparagraphs (A) and (B) of subsection (d)(1).

Petitioners' argument based on section 5(d)(1)(A) is incompatible with BPA's power marketing scheme. Congress was saying nothing about how nonfirm power produced by BPA was to be allocated when it stated that a portion of the DSIs' purchases were to be used to meet the firm power loads which are derived from the needs of BPA's customers. Since some nonfirm energy is frequently used to support the firm power loads served by preference customers,[14] the provision limiting the use of DSI power to serve firm loads only has no effect whatsoever on the priority rights of preference customers to receive nonfirm power. Petitioners seek to advance an argument which is conceptually unsound.

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[14] *See, e.g.*, BPA Contract Official Records, Vol. XXX, p. 008409 (purchases by City of Seattle, and City of Tacoma of nonfirm BPA power to support their capabilities).

Subsection (d)(1)(B) places a key restriction on the manner in which the Administrator is to allocate electricity to the DSIs:

> " . . . the Administrator shall offer in accordance with subsection (g) of this section to each existing direct service industrial customer an initial long term contract that provides each customer *an amount of power equivalent to that to which such customer is entitled under its contract dated January or April 1975* providing for the sale of "industrial firm power." (emphasis added) 16 U.S.C. § 839(c).

The language of subparagraph B, quoted above, places a clear limitation on the amount of power which the Administrator is authorized to allocate to DSIs pursuant to subsections g(1)(D) and g(7). The statute plainly states that the industrial purchase contracts are to provide for the allocation of the same amount of power to which the DSIs were entitled pursuant to the contracts which were negotiated in 1975, prior to the passage of the Act. This limitation sharply contradicts the implied meaning which petitioners seek to derive from the language of 5(d)(1)(A). Petitioners argue that the omission from the provision of nonfirm power with respect to reserves evidences an intention to augment the DSIs' entitlements by giving them newfound rights to purchase nonfirm power. Yet section 5(d)(1)(B) plainly states that the new contracts shall not grant to the DSIs any power beyond that to which they were previously entitled. The Administrator violated § 5(d)(1)(B) by entering into new industrial purchase contracts which increase the DSIs' power entitlement by giving them priority to nonfirm power.

BPA argues that the increased entitlement to DSIs embodied in the reversal of preference entitlements in the new industrial purchase contracts is consistent with § 5(d)(1)(B) because that provision relates only to the amount of power to be allocated pursuant to contract demand equivalencies rather than to the power entitlements which were stipulated under the old contracts. This interpretation is flatly contradicted by the terms of § 5(d)(1)(B). The provision directs the Adminis-

trator to allocate to DSIs an amount of power equivalent to such customers' *entitlement* pursuant to the prior contracts. It is unquestioned that the DSIs' prior entitlements were specifically limited by the priority which preference customers enjoyed with respect to nonfirm power. The new contracts violate the specific mandate of Congress by reversing that limitation and endowing the DSIs with new entitlements which were previously unavailable.

BPA misconstrued their section 5 authority in attempting to deprive the preference customers of their right of priority with respect to nonfirm power. The new allocation methodology violates the plain meaning of sections 5(a) and 10(c) of the Act, which prohibit any abridgment of the rights of public bodies under the preference clauses found in the Bonneville Project Act and related statutes. The methodology is based on an unreasonable and conceptually unsound interpretation of section 5(d)(1)(A), a provision which says *nothing* about initial allocation of nonfirm power. That language addresses the use of power which is to be allocated to the DSIs, but which may later be treated as reserves for the purpose of serving the firm loads of customers suffering deficiencies. This is an entirely different matter from initially allocating nonfirm power to priority customers who are entitled by law to receive the power first. On the basis of the plain meaning of the statute, the Court below was correct in concluding that the new industrial purchase contracts negotiated by BPA and the DSIs are unlawful. The statute and common sense support respondent's contention that the nonfirm power in question must be allocated initially to the preference customers.

The Regional Act's function in regulating power allocation by the Administrator and his subordinates provides further support for the view that the language of sections 5(a) and 10(c) cannot be disregarded by BPA. It is well settled that statutory directives which govern the actions of public officials are

mandatory. This rule was established by this Court as early as 1871:

> "There are, undoubtedly, many statutory requisitions intended for the guide of officers in the conduct of business developed upon them which do not limit their power or render its exercise in disregard of the requisitions ineffectual . . . But when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property and by a disregard of his rights might be and generally would be injuriously affected, they are not directory, but mandatory. They must be followed or the acts done will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise." *French* v. *Edwards*, 80 U.S. 506, 511. *See also*, 2A Sutherland, § 57.14 at 435.

As discussed *supra*, the preference provisions which are contravened by the BPA's decision to abridge respondents' rights to nonfirm power were enacted in order to preserve for the public the benefits of the less expensive hydroelectric power produced at federal installations. The limitations on the discretionary authority set forth in sections 5(a) and 10(c) of the Regional Power Act fall squarely within the rule stated in the language quoted above. The Administrator lacks the discretion to usurp the rights of the preference customers. This attempt to do so is unlawful and was properly struck down by the Court below.[45]

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[45] The interpretation of section 5(d)(1)(A) advanced by BPA is at variance with the rules of construction relevant to determinations by administrative agencies. Administrative constructions which, like the BPA interpretation at issue here, are arrived at in an uncontested non-adversary proceeding are not entitled to great weight. *SEC* v. *Sterling Precision Corp.*, 393 F.2d 214 (2nd Cir. 1968); *Williams* v. *Dandridge*, 297 F.Supp. 450 (D.Md. 1968). *See also*, 2A Sutherland, Statutory Construction, § 49.05 at 239 (1973). Further, arguments of counsel for an administrative agency do not have the persuasive force of an official agency interpretation. *Investment Co. Institute* v. *Camp*, 401 U.S. 617 (1971). *See also*, Sutherland, *Ibid.*

C. Canons Of Statutory Construction Require Rejection Of The DSI's Statutory Interpretation.

A court should resort to the use of extrinsic aids in determining the meaning of a statute only where the language itself is ambiguous and unclear.[26] The language of sections 5(a) and 10(c) is clear. See *supra* at pps. 20. Nothing in the Act is to alter or in any way diminish the preference provisions which apply to the BPA allocations by virtue of other federal laws. The DSIs, by arguing that the language and legislative history of section 5(d)(1)(A) impliedly removed the preference rights which have long been applicable to nonfirm power, attempt to circumvent the clear language of the statute. They seek to do so by invoking provisions of the Act which are unrelated to the matter of allocation of nonfirm power. In light of the unambiguous language of the Act dealing with preference, respondents' arguments based on extrinsic aids are inapplicable.

Rejection of the DSI position is also required by the mandatory nature of the preference saving provisions. Section 5(a) states that "All power sales under this Act *shall* be subject at all times to the preference and priority provisions of the Bonneville Power Act . . ." (emphasis added). Similarly, section 10(c) mandates that "Nothing in this Act shall alter, diminish, abridge or otherwise affect the provisions of other Federal laws by which public bodies and cooperatives are entitled to preference." The use of mandatory language such as "shall" is the single most important textual consideration bearing on whether a statute is mandatory or directive. 2A Sutherland, *Stat Constr.*, § 57.03 at 415 (1973). Sections 5(a) and 10(c) are clearly mandatory terms and evidence a Congressional intent to dictate rather than merely guide. In fact, Congressman Swift, who introduced the initial legislation in the House of Representatives, stated on the House floor that with respect

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[26] 2A Sutherland, Statutory Construction, § 48.01 at p. 182 (1973). *See, e.g., Ex parte Collett*, 337 U.S. 55 (1949).

to any "concern about the difference between mandatory and discretionary provisions, . . . the simplest point to make is where the bill uses the word 'shall,' it means 'shall,' not 'may.' " 126 CONG. REC. E5092, December 1, 1980.

Petitioner's argument that the omission of nonfirm power from the language of § 5(d)(1)(A) of the Regional Power Act yields a DSI entitlement to that power constitutes a flawed attempt to derive negative implications from the statutory language. In reference to the suggested approach that where a statute directs an act to be done in a particular form or manner, it excludes every other manner, Sutherland has stated that statutory interpretation by means of negative implication is a rule which is "not one of substance, but . . . merely a guide to legislative intention." 1A Sutherland, Statutory Construction, § 24.04 at 296 (1973). To the extent that negative implication is useful, the Regional Act militates *against* any DSI entitlement to uninterrupted nonfirm power. The negative implications of sections 5(a) and 10(c), which prohibit any abridgment of respondent's preference rights, are that those rights must be preserved and protected, and that anything in the Act that is inconsistent with those rights must yield.

IV. THE LEGISLATIVE HISTORY OF THE REGIONAL POWER ACT CLEARLY DEMONSTRATES THAT CONGRESS NEVER INTENDED TO RESTRICT PREFERENCE WITH RESPECT TO NONFIRM POWER.

Assuming, *arguendo*, that the language of section 5(d)(1)(A) cited by petitioners can be said to create the requisite degree of ambiguity to justify resort to extrinsic aids, the legislative history of the Regional Act clearly shows that the outcome sought by the DSIs was specifically rejected by the legislators and interested parties who participated in the creation of the statute. The Committee Reports, floor debates and political backdrop to the Act indicate that respondent's rights to priority in the allocation of nonfirm power were intended to be completely preserved and protected. In fact, the passage of the Act depended on the general understanding that all preference rights were to be retained.

The House Interstate and Foreign Commerce Committee makes unequivocal statements regarding the purposes and operation of the Act. H.REP. No. 96-976, Part I, 96th Cong., 2d Sess. (1980) (Commerce), p. 27, 59. The Report goes to great lengths to emphasize the bill's intention of retaining preference rights by way of section 5(a):

> "Concerns have been expressed that S. 885 might be construed to change the meaning or application of preference in the Northwest, and by precedent, nationally. However, the intention of this Committee is clear. The Committee does not want to undo nearly 80 years of history or establish any precedent. Specific provisions incorporated in the Committee amendment are designed to protect the entitlement of both existing and new preference customers to the full Federal base system. These provisions seek to protect preference as to both supply and price."

Later in its Report, the Committee on Interior states,

> "It is not a purpose of this legislation to interfere in any way with, or modify, the statutory rights of preference customers either within or without the region;"
> H.R. REP. No. 96-976, Part II, (Interior) 96th Cong., 2d Sess. (1980), p. 26.

Similarly, the Committee stated in its description of the meaning of section 5(a) that:

> "Section 5(a) makes clear that all power sales under this bill are subject at all times to the Bonneville Project Act, particularly sections 4 and 5 of the Act. This provision therefore retains the preference and priority accorded public bodies and cooperatives in BPA power sales. Related preference protecting provisions include sections 5(b), 7(b) and 10(c)." *Ibid.* at 46.

The Congressional Committees' view that the Act preserves all priorities previously enjoyed by preference customers is corroborated by numerous statements made by the legislators themselves. Representative Foley of Washington addressed the issue specifically when he stated that section 5(g)(7), which provides that BPA shall be deemed to have sufficient power to

enter into the 20-year DSI contracts, "does not 'guarantee' power delivery in the day-to-day operation . . . " 126 CONG. REC. H. 10678 (daily ed. Nov. 17, 1980) (remarks of Rep. Foley). The floor debates are riddled with expressions of the view that the Act was intended to preserve preference rights in all respects.[37] In contrast, the legislative history contains no indication whatsoever that the Act would alter any preference rights.

Resort to the legislative history is unnecessary in light of the Act's plain meaning. Nonetheless, the background to the enactment of Regional Act clearly supports the meaning which, as described elsewhere in this brief[38] is apparent on the face of this statute. The Act prohibits the abridgment of preference rights which BPA and the DSIs seek to achieve by means of contract negotiation. The Court below was correct in so holding, and must be affirmed.

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[37] *See, e.g.*, 126 CONG. REC. S 14693 (daily ed. Nov. 19, 1980) (remarks of Sen. Hatfield); 126 CONG. REC. H 10674 (daily ed. Nov. 17, 1980) (remarks of Rep. Kazen); 126 CONG. REC. H 10677 (daily ed. Nov. 27, 1980) (remarks of Rep. Brown); 126 CONG. REC. H 10679 (daily ed. Nov. 17, 1980) (remarks of Rep. Swift); 126 CONG. REC. H 9850, 9851 (daily ed. Sept. 29, 1980) (remarks of Rep. Swift); 126 CONG. REC. H 9855 (daily ed. Sept. 29, 1980) (remarks of Rep. Symms); 126 CONG. REC. H 9862 (daily ed. Sept. 29, 1980) (remarks of Rep. Duncan).

[38] *See* pps. 18-20, *supra*.

CONCLUSION

For these reasons, the Opinion below of the U.S. Court of Appeals for the Ninth Circuit was correct and should be affirmed. The Regional Act clearly forbids BPA from diminishing respondents' preference rights. The plain meaning of the statute is strongly supported by numerous statements in the legislative history reflecting the intent of Congress to continue all preference priorities. Finally, strong policy considerations corroborate the Congressional determination that the rights of preference historically enjoyed by publicly owned utilities must be preserved in their entirety.

Dated:

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